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No. 85-950

In the Supreme Court of the United States

OCTOBER TERM, 1985

LOWELL B. MARCHANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner challenges his conviction for attempted income tax evasion on grounds of improper venue, running of the statute of limitations, and erroneous failure to give a requested jury instruction.

1. On April 16, 1984, a grand jury in the Eastern District of Arkansas charged petitioner with willfully attempting to evade his income tax liabilities for the years 1977 (Count I) and 1978 (Count II) "by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of Arkansas, a false and fraudulent income tax return" in violation of 26 U.S.C. 7201 (Pet. App. C1-C2). During 1977 and 1978 petitioner and his wife resided in the Western District of Arkansas, but his tax returns were prepared by an accountant in the Eastern District of Arkansas (*id.* at A5). On petitioner's motion, the United States District Court for

the Eastern District of Arkansas transferred the case for trial to the Western District pursuant to 18 U.S.C. 3237(b), which allowed him to elect to be tried in the district in which he was residing (Pet. App. A3). Several pre-trial motions to dismiss for alleged venue and statute of limitations infirmities were preserved in the transfer and later denied by the district court for the Western District of Arkansas (*ibid.*; Pet. 6-7).

At trial, the government introduced evidence showing that petitioner, who held large interests in several businesses, had omitted substantial receipts of money from his 1977 and 1978 tax returns. The evidence showed that substantial amounts of loan interest, rent, and income from sales had not been reported. It also showed that purchases of wearing apparel, home furnishings, real estate, and an airplane had been negotiated with petitioner's corporate checks and entered on the corporate books as advertising, equipment repair, inventory purchases, or other business expenses; some purchases that were so recorded were made with corporate checks payable to fictitious companies, which petitioner or his wife then endorsed in the companies' names and used in purchasing cashier's checks. Pet. App. A2-A3; Tr. 191-192, 264-266, 279-286, 289-296, 614-619, 621-636, 647-651, 823-824.

Petitioner's accountant tax-return-preparer testified, as did petitioner, and, at the close of the five-day trial, petitioner requested an instruction to the jury that he should be found not guilty if he supplied complete information to his accountant, or believed that he had, and signed and filed the returns without having reason to believe they were not correct (Pet. App. D1). The district court ruled, however, that the elements of the offense of willful attempted evasion of taxes were adequately set out in the instructions the court intended to give and denied petitioner's requested instruction (*id.* at D2-D3).

The jury convicted petitioner. The district court sentenced him on January 23, 1985, to one year of imprisonment on Count I, and fined him $10,000 and imposed three years' probation on Count II (Pet. 8).

Petitioner appealed on the grounds, inter alia, that the indictment was infirm because of improper venue; that, with respect to Count I, the statute of limitations had run; and that, for both counts, the trial judge's failure to instruct the jury with respect to petitioner's reliance on his tax return preparer was reversible error (Pet. App. A2).[1] The court of appeals affirmed (*id.* at A1-A12). It held that venue was properly in the Eastern District of Arkansas, where petitioner had set into motion the preparation and attestation of false tax returns by his accountant (*id.* at A3-A5); that the indictment was timely because petitioner's absence from the country for 11 days prior to the return of the indictment tolled the statute of limitations for that period of time (*id.* at A5-A7); and that petitioner's proffered instructions either were "not supported by the facts" or were covered by the instructions given, which "adequately informed the jury of [petitioner's] theory of defense and enabled his counsel to make an adequate argument on the basis of that theory" (*id.* at A10).

2. The court of appeals correctly affirmed the district court's judgment and rulings. Its factbound decision upholding the district court's refusal to utilize petitioner's proposed charge concerning his reliance on his tax return

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[1]Petitioner also contended unsuccessfully on appeal that the district court erred in allowing admission of certain evidence, in failing to discharge an allegedly incompetent juror, and in failing to give other instructions he had requested (Pet. App. A2, A8-A9, A11; Appellant's C.A. Br. 33-39, 41-44). He does not press these issues in his petition.

preparer does not conflict with any decision of this Court or any other court of appeals.[2]

a. Because, as a general matter, the evidence must support a proffered instruction, petitioner here was entitled to his requested instruction only if there was evidence before the court of his good faith reliance on the accountant and full disclosure to him. See, *e.g.*, *United States* v. *White*, 671 F.2d 1126, 1131 (8th Cir. 1982); *United States* v. *Anderson*, 577 F.2d 258, 260-261 (5th Cir. 1978); *Bursten* v. *United*

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[2]Petitioner's other contentions—regarding allegedly improper venue and the statute of limitations bar—were fully considered and correctly rejected by the court of appeals (Pet. App. A3-A7). Its holding on these issues also does not conflict with any decision of this Court or any other court of appeals, and we rely upon the court's opinion here.

With regard to the venue issue, we add that, even if petitioner should have been indicted in the Western District, it is hard to imagine an error more harmless, since that was where—by his request—he was tried, and there is no reason to suppose that a grand jury there would not have indicted him when a petit jury there convicted him. See Pet. App. A5 n.5. The indictment was "sufficient." See *United States* v. *Bailey*, 444 U.S. 394, 414 (1980). Moreover, the constitutional and statutory right is to *trial* in the district in which the offense was committed; there is no provision of law requiring indictment in the district of the offense.

With regard to petitioner's statute of limitations contention, we add that Fed. R. Crim. P. 45(a) provides that, in computing any period of time, the "last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, * * * in which event the period runs until the end of the next day which is not one of the aforementioned days." Thus, should the last day of the six-year statute of limitations period be calculated here as falling on Sunday, April 15, 1984, the statute of limitations period expired at the end of the next day, Monday, April 16, 1984 — the date on which the indictment was returned. See U.S. C.A. Br. 17-20. But see *United States* v. *Guerro*, 694 F.2d 898, 901 n.5 (2d Cir. 1982), cert. denied, 459 U.S. 1222 (1983); *United States* v. *Coniam*, 581 F. Supp. 348 (D. Conn. 1984). (Note that Pet. App. A5 erroneously states that petitioner's 1977 tax return was filed in 1977 rather than 1978.) In addition, because April 15, 1978, was a Saturday, the tax return was not due until April 17, 1978 (see 26 U.S.C. 7503), and the United States had until six years from that date to file charges (see *id.* §§ 6513(a), 6531).

States, 395 F.2d 976, 981 (5th Cir. 1968).[3] The record in this case establishes that petitioner failed to disclose relevant information to the accountant who prepared his tax returns. The accountant used the running totals of general ledgers of petitioner's various corporations to prepare the tax returns of the corporations and petitioner. These summaries were posted monthly from cash receipts and cash disbursement journals, which the accountant did not consult (Tr. 165-166), and the evidence established unrecorded, systematic diversions of money to petitioner from sales not entered on the corporate books (Tr. 621-638). Further, as noted above (page 2, *supra*), personal purchases were negotiated with checks drawn on the corporations' accounts, sometimes payable to fictitious trucking companies and endorsed by petitioner or his wife in these companies' names; the checks were then recorded on the general ledgers as a series of business expenses.[4] Again, the accountant was not provided with these underlying checks (Tr. 58-59); all the information he used to prepare petitioner's tax returns was from other sources (Tr. 52-53, 165-166, 170). Because the record clearly established that petitioner had not disclosed all relevant information to his tax return preparer, the courts below were correct in holding that petitioner was

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[3]Petitioner contends (Pet. 14-16) that *Bursten* and *United States* v. *Mitchell*, 495 F.2d 285 (4th Cir. 1974), conflict with the court of appeals' decision here. Both *Bursten* (395 F.2d at 981) and *Mitchell* (495 F.2d at 287-288), however, recognized that a requested instruction must have some evidentiary foundation. They are, therefore, entirely consistent with the holding in this case.

[4]Indeed, defense counsel admitted in closing argument that there were sales not recorded on the corporate books and personal expenditures made with corporate checks, which were then recorded on the corporate books as legitimate business expenses (see, e.g., Tr. 941-942, 972, 977). Defense counsel blamed these discrepancies on the mistakes and errors of others (see, e.g., Tr. 927-928, 938, 942, 957-958, 972-973).

not entitled to the proffered jury instruction concerning his reliance upon his accountant to prepare his tax returns correctly.

b. In any event, the trial court instructed the jury that the government had to prove, inter alia, that the petitioner had knowledge that more tax was owed than he disclosed (Tr. 1002); that he "willfully attempted, in some manner, to evade or defeat such additional tax, with the specific intent to defraud the government of such additional tax" (*ibid.*); and that "he knew it was his duty under the law to state [the additional income] in his return" (Tr. 1003). The court further instructed that "[a]n act or a failure to act is 'willfully' done if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done[,] as distinguished for [*sic*] something accidental, inadvertent, or negligent" (*ibid.*); that "[m]ere mistake or negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law" (Tr. 1004); that "[t]he law makes a distinction between a purposeful tax violator and one who merely files an incorrect return" (*ibid.*); and that "[i]t is not the purpose of the law to penalize innocent mistakes" (*ibid.*). Under these instructions, the jury could not have convicted petitioner had it believed his repeated arguments (see, *e.g.*, Tr. 931, 947, 951-953) that he had reasonably relied upon his accountant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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